

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WSBS Licensing, Inc.)	MB Docket No. 17-109, CSR 8936-A
)	
For Modification of the Television Market for)	
WSBS-TV, Key West, Florida)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 2017

Released: May 25, 2017

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WSBS Licensing, Inc. and its parent company Spanish Broadcasting System, Inc. (SBS) (collectively, the Petitioner) filed the above-captioned Petition seeking to modify the television market of WSBS-TV (Channel 3) (Facility ID No. 72053), Key West, Florida (WSBS or the Station) to include 41 cable communities in the Miami-Ft. Lauderdale Designated Market Area (DMA) (the Communities).¹ The Petitioner states that a series of market modification decisions between 1996 and 1999 deleted the Communities from the Station's market.² Since that time, SBS acquired WSBS and changed its programming to provide "specialized Spanish-language local service to the Hispanic population in the Communities."³ WSBS has been voluntarily carried in all of the Communities since SBS acquired the Station in 2006.⁴ No oppositions to the Petition have been filed.⁵ For the reasons stated below, we grant the Petition.

II. BACKGROUND

2. Pursuant to section 614 of the Communications Act of 1934, as amended (the Act), and implementing rules adopted by the Commission in its *Must Carry Order*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.⁶ A station's market for this purpose is its "designated market area," or DMA, as defined by

¹ See Petition at Ex. A (list of communities WSBS seeks to include in its market). The specific communities are listed in Appendix A of this Order.

² *Id.* at 3.

³ *Id.* at 2, 5.

⁴ *Id.* at 5.

⁵ See Letter from Nancy A. Ory, Counsel to WSBS Licensing, Inc., to Marlene H. Dortch, Secretary, FCC (filed May 22, 2017) ("Petitioner does not intend to file any additional responsive pleadings.").

⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977, paras. 42-47 (1993) (*Must Carry Order*).

Nielsen Media Research.⁷ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁸

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁹

In considering such requests, the Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence.¹⁰

(IV) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;

(V) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.¹¹

The legislative history of the provision states that:

⁷ Section 614(h)(1)(C) of the Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 CFR § 76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) (*Modification Final Report and Order*).

⁸ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁹ 47 U.S.C. § 534(h)(1)(C).

¹⁰ The STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (2014), enacted December 4, 2014, added a new statutory factor, denominated as factor III above. *See also Amendment to the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014*, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Market Mod Order*).

¹¹ 47 U.S.C. § 534(h)(1)(C)(ii)(I)-(V).

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.¹²

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.¹³

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B¹⁴ contour maps delineating the station's technical service area¹⁵ and

¹² H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

¹³ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

¹⁴ Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit. The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographic features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

¹⁵ While the Grade B contour defined an analog television station's service area, *see* 47 CFR § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited contour service level – which for UHF stations is 41 dBu. *See* 47 CFR § 73.622(e). Accordingly, the Commission has treated a digital station's noise-limited contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507, para. 3, 19554, para. 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292, para. 31 (2005). *See also Lenfest Broadcasting, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 8970, 8974, para. 7 n.27 (2004) ("For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of analog station's Grade B contour.").

showing the location of the cable system headends and communities in relation to the service areas.

- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁶

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

5. In the *DTV Must Carry Report and Order*, the Commission concluded that under section 614(a) of the Act, digital-only television stations had mandatory carriage rights, and amended its rules to reflect this revision.¹⁷ The Commission also clarified its framework for analyzing market modifications for digital television stations.¹⁸ It found that the statutory factors in section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, would be applicable to digital television modification petitions.¹⁹ While the Commission presumed the market of a station's digital signal would be coterminous with that station's market area for its prior analog signal, it recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of its former analog television signal.²⁰ Therefore, in deciding DTV market modifications, the Commission would take changes in signal strength and technical coverage into consideration, on a case-by-case basis.²¹

III. DISCUSSION

6. At the time the Commission deleted the Communities from WSBS's market through a series of market modification decisions, "the Station's programming consisted primarily of foreign programming from Argentina, Brazil, Venezuela, Bolivia and Peru, and provided little coverage of issues

¹⁶ 47 CFR § 76.59(b).

¹⁷ See *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2606, 2610 (2001) (*DTV Must Carry Report and Order*); 47 CFR § 76.64(f)(4).

¹⁸ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2635-36. The Commission affirmed that for digital signal carriage issues, it would continue to rely on the Nielsen market designations, publications, and assignments it used for analog signal carriage issues. See *id.* at 2636.

¹⁹ See *id.* at 2636.

²⁰ See *id.* In adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to ensure that a station's digital over-the-air coverage area would replicate as closely as possible its former analog coverage area. See *id.* at 2636, n.254 (citing *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997)).

²¹ See *id.*

of concern to South Florida residents.”²² Today, in contrast, the Petitioner explains that WSBS is the Miami-Ft. Lauderdale DMA’s only provider of television programming that targets the large Cuban and Latin American population in that area.²³ The Petitioner states that its circumstances are substantially similar to another Key West broadcaster (WGEN-TV) where the Commission reinstated the must carry status of WGEN-TV in 45 communities in the Miami-Ft. Lauderdale DMA.²⁴ For the reasons discussed below, we find that the television market of WSBS should be modified to include the Communities.

7. The first statutory factor we must consider is “whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community.”²⁵ The Petitioner explains that WSBS “has long been *voluntarily* carried on all cable systems serving the Communities.”²⁶ Comcast, Advanced Cable, and Atlantic Broadband have carried WSBS continuously on their systems in the Miami-Ft. Lauderdale DMA since at least 2006, and DISH and DirecTV also carry WSBS in the Miami-Ft. Lauderdale DMA.²⁷ Further, WSBS broadcasts from the same tower as WGEN-TV, and the Commission previously concluded that WGEN-TV is entitled to mandatory carriage rights throughout the DMA.²⁸ We thus conclude that the first statutory factor weighs in favor of the requested modification.

8. Second, we consider “whether the television station provides coverage or other local service to such community.”²⁹ The Petitioner asserts that a station’s noise limited service contour (NLSC) and the distance between the station and the cable communities are relevant, but not dispositive to this inquiry. In this regard, WSBS notes that the relevant cable systems already carry WSBS as well as co-located WGEN-TV.³⁰ Although WSBS lacks signal coverage of the Communities, it provides local service to the Communities via WSBS-CD, its co-owned Class A station.³¹ The signal of WSBS-CD “covers each of the cable headends of the major cable systems in the market and 39 of the 41 Communities.”³² WSBS “has installed fiber optic transmission facilities to ensure that it delivers a clear signal from its Key West and Miami studios to several cable headends,” and SBS states that it will continue to take all steps needed to ensure that the Station delivers an adequate signal to all cable headends.³³

9. Further, WSBS states that it is “the only provider of locally-produced programming targeting the Cuban and Latin American population of South Florida, including local news, television

²² Petition at 3, 5.

²³ *Id.* at 2.

²⁴ *Id.* at 4.

²⁵ 47 U.S.C. § 534(h)(1)(C)(ii)(I).

²⁶ Petition at 13.

²⁷ *Id.*

²⁸ *Id.* at 14. See also *In the Matter of Mapale LLC for Modification of the Miami, Florida DMA*, Memorandum Opinion and Order, 24 FCC Rcd 8366 (MB 2009) (*WGEN Market Modification Decision*).

²⁹ 47 U.S.C. § 534(h)(1)(C)(ii)(II).

³⁰ Petition at 16, 24-25. See also *Brenmor Cable Partners, L.P., et al.*, Memorandum Opinion and Order, 14 FCC Rcd 11742, 11754, para. 32 (CSB 1999) (“the significance of geographic distance can be mitigated by other factors such as the carriage of similarly-situated television stations”).

³¹ Petition at 12, 16.

³² *Id.* at 16. See also *id.* at Ex. G (Cable Headend Map, Cable Community Map).

³³ *Id.* at 25.

shows, music and live entertainment.”³⁴ The Miami-Ft. Lauderdale DMA includes three counties: Monroe County (where Key West, the Station’s community of license, is located), Miami-Dade County, and Broward County. Data from the 2010 U.S. Census indicates that approximately two-thirds of the population of Miami-Dade County is Hispanic or Latin, approximately 25 percent of the population of Broward County is Hispanic or Latin, and more than 20 percent of the population of Monroe County is Hispanic or Latin.³⁵ Most Hispanic residents of the Miami-Ft. Lauderdale DMA are from Cuba and other Latin American countries other than Mexico.³⁶ Out of the six full-power or Class A television stations that provide Spanish-language programming in the Miami-Ft. Lauderdale DMA, four are focused mainly on Hispanic audiences of Mexican descent, one is focused mainly on Cuban Americans, and only WSBS focuses both on Cuban Americans and on other non-Mexican Latin Americans.³⁷ In addition, the Petitioner explains that the Station maintains offices and a production studio/facility in Miami, and all of the Station’s local programming is produced in that facility, which is evidence of the Station’s in-market presence.³⁸ WSBS participates in many community events in the Miami area, and it covers election results in the Communities and interviews local political candidates.³⁹ Miami’s largest daily newspaper, *The Miami Herald*, and its Spanish-language sister publication, *El Nuevo Herald*, both have published numerous reports on WSBS programming.⁴⁰ Based on the totality of the record, particularly WSBS-CD’s coverage of the communities and WSBS’s programming focused on providing local news and information relevant to the Communities, we find that the second statutory factor weighs in favor of the requested modification.

10. The third statutory factor is “whether modifying the market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.”⁴¹ This factor is intended to ensure that MVPD subscribers are “receiving news, politics, sports, emergency information, and other television programing relevant to their home state” and “relevant to their everyday lives.”⁴² The Petitioner asserts that this factor “weighs heavily in favor of” the Station, which airs “programming that targets the vast majority of the population of the Miami-Ft. Lauderdale DMA including Cubans and other non-Mexican Latin Americans.”⁴³ In this instance, we find the third statutory factor inapplicable. The Miami-Ft. Lauderdale DMA is well-served with broadcast signals that originate in the State of Florida, including WSBS’s signal. Accordingly, we assign no weight to this factor in our analysis.

11. Fourth, we consider “whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news

³⁴ *Id.* at 19. The Petitioner submitted nearly 20 letters from community and political leaders emphasizing the value of WSBS to the local area. *Id.* at 21-22 and Ex. H.

³⁵ *Id.* at 7.

³⁶ *Id.* at 7, 19-20.

³⁷ *Id.* at 22. See also *id.* at 20.

³⁸ *Id.* at 27.

³⁹ *Id.*

⁴⁰ *Id.* at 28.

⁴¹ 47 U.S.C. § 534(h)(1)(C)(ii)(III).

⁴² *STELAR Market Mod Order*, 30 FCC Rcd at 10407, para. 1, 10420, para. 18 (2015) (citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322, at 11 (2014)).

⁴³ Petition at 23.

coverage of issues of concern to such community or provides carriage or coverage of sporting events of interest to the community.”⁴⁴ As explained above, while other television stations serve the Communities, WSBS “is the only provider of local-produced programming targeting the Cuban and Latin American population of South Florida, including local news, television shows, music, and live entertainment.”⁴⁵ As we have stated before, “we believe Congress intended for this [fourth] statutory criterion to enhance a station’s market modification claim where it could be shown that other stations did not serve the communities at issue. Because other stations do serve the communities, this factor neither weighs against nor in favor of [the Petitioner’s] modification request.”⁴⁶ Based on the record, we assign marginal weight to this factor in favor of the requested modification. Although, the Miami-Ft. Lauderdale DMA is served by numerous broadcast stations, WSBS is unique in its service to the Cuban and Latin American population of South Florida.

12. The fifth statutory factor focuses on “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”⁴⁷ The Petitioner asserts that the Commission does not provide significant weight to lack of audience share for specialty stations like WSBS.⁴⁸ Regardless, the Petitioner explains that the Station’s Nielsen ratings in the Miami-Ft. Lauderdale DMA have been significant for the past ten years, particularly when considering only Hispanic television households.⁴⁹ Over the past five years, the Station has achieved a two to four percent share of Hispanic households based on ratings for Monday through Saturday, 8 pm to 11 pm, and Sunday, 7 pm to 11 pm.⁵⁰ The Petition states, “[a] review of the weekly comes for WSBS-TV over the last ten years shows that the Station has significantly higher average week estimates than other stations in the Miami-Ft. Lauderdale DMA.”⁵¹ In addition, the fact that the Station’s advertisers rely on WSBS to reach local audiences in the Communities demonstrates that the Station is viewed in those areas.⁵² We find that the fifth statutory factor weighs in favor of the requested modification.

13. In addition to the enumerated statutory factors, the Petitioner points to other factors that it states demonstrate the close relationship between WSBS and the Communities.⁵³ For example, WSBS advertises to its viewers in Miami-Dade and Broward Counties through local radio stations, local newspapers and publications, billboards in Miami, and signs on local public transportation.⁵⁴ In addition, the Petition states that there is a significant overlap among the workforce of Monroe County (where the

⁴⁴ 47 U.S.C. § 534(h)(1)(C)(ii)(IV).

⁴⁵ Petition at 19.

⁴⁶ See *Petition for Modification of Dayton, OH Designated Market Area*, Memorandum Opinion and Order, 28 FCC Rcd 16011, 16019, para. 22 (MB 2013).

⁴⁷ 47 U.S.C. § 543(h)(1)(C)(ii)(V).

⁴⁸ Petition at 25 (*citing KJLA, LLC for Modification of the Television Market for Station KJLA-DT, Ventura, California*, Memorandum Opinion and Order, 26 FCC Rcd 12652, 12660 and n.54 (MB 2011)).

⁴⁹ Petition at 25 and Ex. I.

⁵⁰ *Id.* at 25-26. Although the Station’s average share of Hispanic households drops to about 1.14 percent based on all-day ratings (Monday through Sunday, 7 am to 1 am), the Petitioner explains that this should not weigh against the Petition since WSBS is a “specialty” station. *Id.* at 26, n.67.

⁵¹ *Id.* at 26.

⁵² *Id.*

⁵³ *Id.* at 25-30.

⁵⁴ *Id.*

Station is located), Miami-Dade County, and Broward County.⁵⁵ Key West's Congressional district also includes part of Miami-Dade County, Monroe County and Miami-Dade County are part of the same Florida Senate district, and Monroe County and a portion of Miami-Dade County are part of the same Florida House of Representatives district.⁵⁶ All of these facts further demonstrate the connection between the Station and the Communities.

14. We conclude that the facts support the grant of the Petitioner's request to modify the market of the Station by reinstating the Communities that were previously deleted. Section 614(h)(1)(C) of the Act authorizes the Commission to include or exclude particular communities from a television station's market for the purposes of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁵⁷ Section 614(h)(1)(C)(ii) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking certain specific factors into account.⁵⁸ Above we have considered those factors, and we find that, with the exception of the third statutory factor to which we assign no weight, all of the factors weigh in favor of granting the Petition. The nexus between the Station and the Communities is significant, including in particular its status as the sole station in the market providing locally-produced programming aimed at the local Cuban and Latin American populations. For the reasons discussed herein, we grant the Petition.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and section 76.59 of the Commission's rules, 47 CFR § 76.59, that the captioned petition for special relief (MB Docket No. 17-109, CSR 8936-A) filed by WSBS Licensing, Inc. and its parent company Spanish Broadcasting System, Inc. **IS GRANTED**.

16. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules.⁵⁹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division, Media Bureau

⁵⁵ *Id.* at 29.

⁵⁶ *Id.* at 29-30. See also *WGEN Market Modification Decision*, 24 FCC Rcd at 8375, para. 12 (an overlap of Congressional districts can "confirm the commonality of interest" between a station and communities at issue).

⁵⁷ 47 U.S.C. § 534(h)(1)(C).

⁵⁸ *Id.* § 534(h)(1)(C)(ii).

⁵⁹ 47 CFR § 0.283.

APPENDIX A

Bal Harbour
Bay Harbour Islands
Broward
Broward, Portion of
Broward County, Unincorporated Areas of
Coral Gables
Coral Springs, City of
Dade, Portions of
Dade County, Unincorporated Areas of
Deerfield Beach
Florida City
Ft. Lauderdale
Golden Beach
Hallandale
Hialeah
Hialeah Gardens
Hillsboro Beach
Homestead
Key Biscayne
Lauderdale-by-the-Sea
Lauderhill
Lazy Lake
Liberty City
Lighthouse Point
Medley
Miami Beach
Miami Springs
North Bay Village
North Dade
Oakland Park
Plantation
Pompano Beach
Sea Ranch Lakes
South Dade
Sunrise
Surfside
Sweetwater
Tamarac
Virginia Gardens
West Miami
Wilton Manors